

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

15-7243

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLIFFORD J. ARNOLD,

Plaintiff-Appellee,

-against-

DONALD M. AGEN and VICTOR CERAMI,

Defendants-Appellants.

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P/S

APPELLANTS' BRIEF

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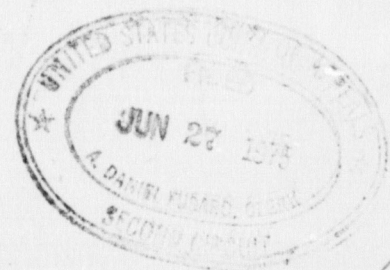


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Preliminary Statement

This is an appeal by defendants, State University Campus Police Officers, from a judgment of the United States District Court, Western District, New York (ELFVIN, J.), entered March 4, 1975, after a jury trial, which awarded plaintiff, Clifford Arnold, expenses of \$1,034.38 and compensatory damages of \$4,000 against defendants Agen and Cerami, and \$15,000 punitive damages, assessed as \$12,000 against Cerami and \$3,000 against Agen.

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Statutes Involved

42 U. S. Code, § 1983:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U. S. Code:

Federal Rules of Civil Procedure

"Rule 51. Instructions to Jury: Objection

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

New York State Education Law, § 355(2):

"m. To appoint from time to time, security officers and peace officers for the state university, and to remove such peace officers at pleasure; provided, however, that any person appointed a peace officer must have satisfactorily completed or complete within six months of the

date of his appointment a course of law enforcement training approved by the municipal police training council in consultation with the university. It shall be the duty of such security officers and peace officers to preserve law and order in and about the buildings and grounds of the institution of the state university to which they are assigned. Persons appointed peace officers shall, in the course of and actual performance of their official duties, have the powers of police officers as defined in the criminal procedure law and, when so engaged, shall be exempt from prosecution under the penal law for possession of a police nightstick or baton. Persons appointed security officers shall, in the course of and in the actual performance of their official duties have the power to issue and serve a simplified traffic information and appearance ticket in the form prescribed by the commissioner of motor vehicles pursuant to section two hundred seven of the vehicle and traffic law, upon a person when he has reasonable cause to believe that such person has committed a traffic infraction in his presence on the sites owned, operated and maintained by state university, and where applicable, such simplified traffic infractions shall be administered pursuant to the provisions of article 2-A of the vehicle and traffic law.

"The appointment of such security officers and peace officers shall not be deemed to supersede in any way the authority of other peace officers. The provisions of this paragraph m. shall not apply to any of the state institutions and property referred to in section five thousand seven hundred nine of this chapter."

New York State Criminal Procedure Law, § 1.20:

"33. 'Peace officer.' The following persons are peace officers:

(a) A police officer;

(b) An attendant, uniformed court officer or an official of the supreme court in the first and second departments;

(c) An attendant, uniformed court

officer or other official attached to the county courts of Nassau and Suffolk counties;

(d) A marshal, clerk or attendant of a district court;

(e) A clerk, uniformed court officer or other official of the criminal court of the city of New York;

(f) A uniformed court officer or an official of the civil court of the city of New York;

(g) An attendant, clerk or uniformed court officer of the family court;

(h) An attendant, or an official, or guard of any state prison or of any penal correctional institution;

(i) A parole officer in the department of correctional services;

(j) A harbor master appointed by a county, city, town or village;

(k) An investigator of the office of the state commission of investigation;

(l) Onondaga county park rangers;

(m) An officer or agent of a duly incorporated society for the prevention of cruelty to animals or children;

(n) An inspector or investigator of the department of agriculture and markets;

(o) An employee of the department of taxation and finance assigned to enforcement of the tax on cigarettes imposed by article twenty of the tax law by the commissioner of taxation and finance;

(p) An employee of the New York City finance administration assigned to enforcement of the tax on cigarettes imposed by section

D46-2.0 of the administrative code of the city of New York by the finance administrator;

(q) A constable or police constable of a city, county, town or village; or a bay constable of the town of Hempstead;

(r) Suffolk county park rangers;

(s) A probation officer;

(t) The sheriff, under-sheriff and deputy sheriffs of New York City;

(u) Long Island railroad police.

"34. 'Police officer.' The following persons are police officers:

(a) A sworn officer of the division of state police;

(b) Sheriffs, under-sheriffs and deputy sheriffs of counties outside of New York City;

(c) A sworn officer of an authorized county or county parkway police department;

(d) A sworn officer of an authorized police department or force of a city, town, village or police district;

(e) A sworn officer of an authorized police department of an authority or a regional state park commission;

(f) A sworn officer of the capital buildings police force of the office of general services;

(g) An investigator employed in the office of a district attorney;

(h) An investigator employed by a commission created by an interstate compact who is, to a substantial extent, engaged in the enforcement of the criminal laws of this state;

(i) The chief and deputy fire marshals, the supervising fire marshals and the fire

marshals of the bureau of fire investigation of the New York City fire department;

(j) The chief of the bureau of law enforcement and field services, assistant superintendent of law enforcement, regional conservation officers, assistant regional conservation officers and conservation officers in the conservation department;

(k) A sworn officer of a police force of a public authority created by an interstate compact.

"34-a. 'Geographical area of employment.' The 'geographical area of employment' of certain police officers is as follows:

(a) New York state constitutes the 'geographical area of employment' of any police officer employed as such by an agency of the state or by an authority which functions throughout the state;"

New York State Vehicle and Traffic Law:

"§ 132. Police officer

"Every member of the state police and every duly designated peace officer."

New York State Criminal Procedure Law:

"§ 140.10 Arrest without a warrant; by police officer; when and where authorized

"1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

"2. A police officer may arrest a person for

a petty offense, pursuant to subdivision one, only when:

(a) Such offense was committed or believed by him to have been committed within the geographical area of such police officer's employment; and

(b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him in any county in which he apprehends him.

"3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55."

New York State Criminal Procedure Law:

"§ 140.25 Arrest without a warrant; by peace officer other than police officer

"1. A peace officer other than a police officer, acting pursuant to his special duties, may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

"2. A peace officer other than a police officer acts 'pursuant to his special duties' in making an arrest only when the arrest is for:

(a) An offense defined by a statute which such peace officer, by reason of the specialized nature of his particular employment or by express provision of law, is required or authorized to enforce; or

(b) An offense committed or reasonably believed by him to have been committed in such manner or place as to render arrest of the offender by such peace officer under the particular circumstances an integral part of his specialized duties.

"3. A peace officer other than a police officer, whether or not he is acting pursuant to his special duties, may arrest a person for an offense committed or believed by him to have been committed within the geographical area of such peace officer's employment, as follows:

(a) He may arrest such person for any offense when such person has in fact committed such offense in his presence; and

(b) He may arrest such person for a felony when he has reasonable cause to believe that such person has committed such felony, whether in his presence or otherwise.

"4. A peace officer, when outside the geographical area of his employment, may, anywhere in the state, arrest a person for a felony when he has reasonable cause to believe that such person has there committed such felony in his presence, provided that such arrest is made during or immediately after the allegedly criminal conduct or during the alleged perpetrator's immediate flight therefrom.

"5. For the purposes of this section, the 'geographical area of employment' of a peace officer other than a police officer is as follows:

(a) The 'geographical area of employment' of any peace officer employed as such by any agency of the state consists of the entire state;

(b) The 'geographical area of employment' of any peace officer employed as such by an agency of a county, city, town or village consists of (i) such county, city, town or village, as the case may be, and (ii) any other place where he is, at a particular time, acting in the course of his particular duties or employment."

New York State Penal Law:

"§ 195.05 Obstructing governmental administration

"A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

"Obstructing governmental administration is a class A misdemeanor."

New York State Penal Law:

"§ 240.25 Harassment

"A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or
2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
3. He follows a person in or about a public place or places; or
4. As a student in school, college or other institution of learning, he engages in conduct commonly called hazing; or
5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation."

Statement of the Case

This action was brought under the United States Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985, against four members of a State University campus police force. The cause of action for conspiracy (§ 1985) was dismissed without objection, and the section 1983 action was dismissed as to all but the two appellants. Judgment after jury verdict was entered in the amount of \$5,034.38 compensatory damages against both appellants, and \$12,000 punitive damages against Victor Cerami, and \$3,000 punitive damages against Donald M. Agen.

Statement of Issues

1. Did not the trial Court err as a matter of law in instructing the jury that the defendants were not police officers, were not peace officers, and had no legal authority to carry a blackjack or to issue a "summons for the infraction which occurred" in this case?
2. Moreover, were not the instructions couched in terms so prejudicial as to require the judgment to be set aside, and a new trial ordered?
3. Did the trial Court commit reversible error in refusing to charge the jury relevant portions of New York State Education Law and Criminal Procedure Law, as requested by counsel for the defendants?

4. Did the trial Court commit reversible error in failing to inform counsel of his proposed instructions to the jury and in failing to inform defense counsel of his action on defendants' requests to charge, prior to the closing arguments to the jury, as required by FRCP, Rule 51?

5. On the matter of damages, was it not error:

(a) to fail to separately assess compensatory damages against each individual defendant;

(b) to award punitive damages without a specific finding of malice;

(c) to award damages for false arrest for alleged expenses incurred after arraignment;

(d) to award \$4,000 additional compensatory damages, where there was no permanent or residual injury, and actual expenses alleged were \$64.38 medical costs, \$39 lost wages, \$750 attorney's fees and \$181 lost wages for court appearances;

(e) to award damages in this action for an alleged malicious prosecution?

Facts

The defendants, Donald Agen and Victor Cerami, were duly appointed peace officers at Buffalo State College, pursuant to New York State Education Law, § 355(2)(m), and were on patrol duty on the date of this incident, the early morning hours of October 13, 1973. The plaintiff was a former student at the

college and was working as a bartender at the Masthead Bar on the corner of Letchworth and Grant Streets in Buffalo, which is directly across the street from the college. Earlier the previous evening, plaintiff had lent his car to a friend, one Richard Tarquinio.

At about 2:30 a.m. Tarquinio was returning the vehicle to the plaintiff when he proceeded north on Rees Street, a street that borders the campus property. Tarquinio then passed a stop sign located on campus property at the corner of Rees Street and Rockwell Road, an entrance to the campus, and turned left onto Letchworth Street, a city street also bordering the campus.

Officers Agen and O'Brien observed the violation and pursued Tarquinio along Letchworth Street. Tarquinio stopped momentarily at the intersection of Letchworth and Grant Streets and Officer Agen exited his vehicle to approach him. Then Tarquinio started up again and Officer Agen got back in the patrol vehicle and called for a backup unit. However, after crossing Grant Street, Tarquinio pulled over to the curb and parked. The officers stopped behind him and Officer Agen approached Tarquinio and asked to see his license and registration, and told him he was going to give him a summons for failing to stop for the stop sign. Tarquinio, however, had neither license, registration, nor any identification, and was told he would have to be taken to the campus security station for a check to determine who he was, and whether he possessed a valid operator's permit.

At this point, the plaintiff who observed the police officers behind his car, from inside the Masthead Bar, left the bar and came across the street. He informed the officers that the vehicle was his car and asked what had happened. Officer Agen asked the plaintiff to produce the registration, which the plaintiff did. Officer Agen told the plaintiff that he was taking Tarquinio to the campus security office to identify him and to issue him a summons for passing a stop sign. He told the plaintiff that he would need the registration to fill out the summons and the plaintiff could pick it up at the campus security office. The plaintiff began arguing with Officer Agen, used foul language, cursed him and told him to: "Give me my fucking registration." He then according to the various witnesses, either tried to grab the registration or lunged at Officer Agen. The two men grappled briefly up against the car. Officer Agen's glasses were knocked off and his belt radio was knocked to the ground.

Officer Cerami, who had arrived on the scene as a backup unit had observed the argument from across the street. A crowd exiting the bar was gathering. When the grappling began, Officer Cerami rushed across the street and, to break up the fight, he struck the plaintiff once on the head. The plaintiff started to run away, but stopped after several yards. Officer Agen then arrested the plaintiff for harassment and obstructing

governmental administration (New York State Penal Law, §§ 195.05 and 240.25).

The plaintiff was taken to the campus security office where first aid was administered to his head wound, and then to a hospital where he received several stitches. From the hospital he was taken to the 5th precinct in Buffalo and turned over to city police. After two hours, he was taken to the City Court, arraigned and released in his own custody.

Subsequently the charges were dismissed without prejudice and no appeal was taken by the office of the prosecutor. The charge of obstructing governmental administration was again laid by Officer Agen on instruction of his superior, and the plaintiff, without being arrested, was again arraigned. In a subsequent court hearing, the charge was dismissed with prejudice, no appeal being taken by the prosecutor. Meanwhile, Tarquinio paid a \$25.00 fine for the traffic violation.

Plaintiff subsequently brought this action against the defendants and others (who won a dismissal) under 42 U.S.C. 1983 and 42 U.S.C. 1985. The cause of action under section 1985 has also been dismissed.

After the evidence was in, counsel for all parties submitted proposed jury instructions. However, without informing counsel of his action on their requests, and without

giving advance notice to defense counsel of his intended instructions, the trial Court instructed the jury that as a matter of law, the defendants were not police officers, were not peace officers and had no authority to carry a blackjack or to issue a summons in the instant case. Defendants promptly objected to such instructions and requested that the trial Court include in his charge pertinent sections of New York State Education Law and the Criminal Procedure Law, and the Court refused.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE DEFENDANTS WERE NOT PEACE OFFICERS AND HAD ARRESTED THE PLAINTIFF WITHOUT AUTHORITY.

New York State Education Law, § 355(2)(m) clearly establishes that the defendants were duly appointed and sworn peace officers. The statute establishes two categories of campus security personnel: security officers, who are merely guards and watchmen, except that they have specific authority to issue simplified traffic informations on campus (much as meter-maids do in some cities); and peace officers "who shall have the power of police officers as defined in the Criminal Procedure Law". The Criminal Procedure Law, § 140.10 provides that:

"3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55."

Moreover, Criminal Procedure Law, § 140.25 also provides:

"5. For the purposes of this section, the 'geographical area of employment' of a peace officer other than a police officer is as follows:

(a) The 'geographical area of employment' of any peace officer employed as such by any agency of the state consists of the entire state;"

The State University is a "corporate agency" of the State of New York (State University of New York v. Syracuse University, 206 Misc. 1003, affd. 285 App. Div. 59; People v. Branham, 53 Misc 2d 346) and therefore a campus police "peace officer" is a police officer and a peace officer within the definition of Criminal Procedure Law, § 1.20, subsections 33(a) and 34(e).

Two recent court decisions have further emphasized this status. In People v. Wesley, 80 Misc 2d 1002 (City Court, Buffalo, 1975) the Court said:

"The defendant contends that the arresting officer, a security guard at the State University of New York at Buffalo, is not a peace officer. A list of peace officers is recited in CPL 1.20 (subd. 33). This list of peace officers does not include campus security officers. However, section 355 (subd. 2, par. m) of the Education Law of New York does designate special policemen for State universities as peace officers. This designation of persons as peace officers in the Education Law was made by the same Legislature that designated peace officers in the CPL. The Legislature has the authority to designate peace officers; they chose to exercise this authority in the Education Law. Therefore, officers appointed pursuant to section 355 (subd. 2, par. m) of the Education Law are peace officers to the extent set forth therein.

* * *

"The charges of resisting arrest, section 205.30 of the Penal Law, and escape, section 205.05 of the Penal Law, are also sustained on the determination that the campus police are peace officers."

And in People v. Ware (not yet reported, June 2, 1975, Appendix p. 40) the Erie County Court sitting as an appellate court, held:

"[T]he chief administrative officer of the State University of New York at Buffalo appointed the arresting officer in this case as a peace officer who shall have the powers of a police officer as defined in the Criminal Procedure Law. Therefore, the complainant in this action was properly appointed and had the authority to make the arrest of the defendant-respondent."
(Emphasis supplied.)

It might also be observed that the defendants' oaths and appointments (Appendix, Exh. A) recite that defendants are peace officers; and further that the civil service announcements (Appendix, Exh. B) specifically state that appointees such as defendants herein "have peace officer status".

It is abundantly clear therefore that the defendants were peace officers, were police officers and had authority to issue the summons to Tarquinio and investigate him because of his lack of identification. Their authority as peace officers extended throughout the entire state and was not limited to the physical confines of the campus. Their duties were to preserve law and order in and about the campus¹ but their status as peace

¹/ Even if the defendants only had peace officer status in and about the campus, "about" certainly includes circumference. "About" has broader meaning than "on and upon" (Ryan v. Desmond, 118 Ill. App. 186) and means "reasonable proximity" or "bounded by" (1 WORDS & PHRASES [ABOUT] § 212 [1964 Ed.]). It has been interpreted to include from 15 to 20 paces on a public highway to one mile away (Brown v. State, 31 Ala. 353; Whaley v. State, 6 So. 380; Powell v. State, 63 Ala. 177). Other courts have held that "about" may have the meaning of around, on the outside of, or without the limitations (Thompson v. Brooks, 43 N. H. 540) or "outside the area of, but in physical contiguity with" (Lott v. Mosley, 268 P. 109), or "near to" (Janzen v. Phillips, 437 P. 2d 189).

officers was clearly statewide (see Criminal Procedure Law, § 140.10, Practice Commentary by Richard G. Denzer, B. "Bailiwick problems" and Criminal Procedure Law, § 140.25, Practice Commentary by Richard G. Denzer [McKinney's Consolidated Laws of New York Annotated])).

This conclusion is further clear from the formal training requirements set forth in the statute (Education Law, § 355[2][m]) and the minimum qualifications and requirements enlisted on the civil service announcements (Appendix, Exh. B). That defendants were obviously peace officers off campus is clear from the testimony in the record that they also served a tour of duty with the City of Buffalo Police Tactical Patrol (S.M. 362).

Further, defendants had authority to issue the summons since, for the purposes of the Vehicle and Traffic Law, Art. 1, § 132 of the Vehicle and Traffic Law defines a police officer as "Every member of the state police and every duly designated peace officer."

It was immaterial, therefore, whether title to the right of way to Rees Street rested in the City of Buffalo, a matter the Trial Court mentioned. The incident giving rise to this action occurred across the street from a parking lot of the State University to which access could be had from the city street. The initial traffic violation involved a stop sign located on University property. The entire purpose of the stop sign was the protection of pedestrians and vehicles entering and exiting

the campus. The violation was therefore against the peace and safety of the University, just as much as if someone on a public street were discharging a firearm onto University property.

The defendants, in any event, were acting within their authority in issuing a traffic summons on a street bordering the campus for the violation of a stop sign located on campus property, which sign was erected for the protection of cars and pedestrians exiting the campus.

When the plaintiff began harassing the defendant Agen, using loud and foul language, and grappled with defendant Agen, whom he knew to be a uniformed campus police officer, knocking off Agen's glasses and the radio from Officer Agen's belt, Officer Agen had probable cause to arrest the plaintiff for harassment and obstructing governmental administration. The plaintiff's involvement may have occurred off campus, but he was clearly interfering with a peace officer who was reasonably discharging his duty. Moreover, since New York Criminal Procedure Law, §§ 140.10 and 140.25 establish that the geographic area of employment of any police officer and any peace officer employed by any agency of the State consists of the entire State, and since the State University is an agency of the State, Officer Agen was acting within the scope of his authority.

The Trial Court's instruction to the jury about the defendants' peace officer status was clearly erroneous and highly prejudicial, and requires reversal of the judgment below.

POINT II

THE TRIAL COURT ERRED IN FAILING TO INFORM COUNSEL OF ITS INSTRUCTIONS AND OF ITS RULINGS ON DEFENSE REQUESTS PRIOR TO CLOSING ARGUMENTS.

Rule 51, FRCP requires the Trial Court to inform counsel of its proposed action upon requests for instructions prior to their arguments to the jury. The language of the rule is mandatory, and the failure of the Court below to comply with Rule 51 constitutes reversible error because of the obvious prejudice to the defendants herein (Hetzel v. Jewel Companies, 457 F. 2d 527 [7th Cir., 1972]; Bradshaw v. Thompson, 454 F. 2d 75 [6th Cir., 1972], cert. den. 409 U.S. 878).

POINT III

THE DAMAGES AWARDED ARE EXCESSIVE AND UNSUPPORTED BY THE RECORD.

A.

There was probable cause for the arrest and damages for false arrest should not have been allowed.

It is well established that where an action is brought against State Police officials under 42 USC 1983, for an alleged invasion of civil rights by assault and arrest, the state law of tort liability for false arrest and assault and defenses thereto, will be applied by the federal courts (Street v. Surdyka, 492 F. 2d 368 [4th Circuit, 1974]; Jennings v. Davis, 476 F. 2d 1271 [8th Circuit, 1973]; Dowsey v. Wilkins, 467 F. 2d 1022 [5th Circuit, 1972]; Antelope v. George, 211 F. Supp. 657 [D.C. Idaho, 1962]; Pollack v. City of Newark, 147 F. Supp. 35 [D.C. N.J., 1956]).

Defendant Agen, in the course of his duties as a State University peace officer, was reasonably investigating the identity of a motorist who concededly committed a traffic violation. The plaintiff thereupon intervened and got into an argument with Officer Agen, abused him with loud and foul language and grappled with him. At the very least, Officer Agen had reasonable and probable cause, even if he were acting as a private citizen, to arrest the plaintiff, for harassment in violation of New York State Penal Law, § 240.25. He also had reasonable grounds to believe plaintiff was obstructing governmental administration in violation of Penal Law, § 195.05. Even if Officer Agen were beyond his jurisdiction, and the obstruction charge should fail, the arrest for harassment was based on probable cause, such as a private citizen could make.

There was therefore no false arrest, since there is only one arrest, even though there may be multiple charges (Casler v. State, 33 A D 2d 305). Otherwise, a prosecutor could never plea bargain.

Moreover, the plaintiff was held on personal recognizance after arraignment. Arraignment after a warrantless arrest confirms probable cause for the arrest under New York law (Graham v. Buffalo General Laundries Corp., 261 N.Y. 165; Langley v. City of New York, 40 A D 2d 844; Dixson v. State, 30 A D 2d 626; Gearity v. Strasbourger, 133 App. Div. 701).

Moreover, damages even for unlawful arrest terminate upon arraignment (Hoffman v. Halden, 268 F. 2d 280 [CA 9th, 1959]; Antelope v. George, 211 F. Supp. 657 [D.C. Idaho, 1962]; Graham v. Buffalo General Laundries Corp., *supra*; Casler v. State, *supra*; Carpenter v. City of Rochester, 67 Misc 2d 862, *affd.* 39 A D 2d 1015), because arraignment is judicial recognition of probable cause, and thereafter a detention, even though it may be erroneous, is a detention by due process of law.

Assuming that damages for expenses incurred after arraignment were awarded not for false arrest, but for malicious prosecution, such an award is equally erroneous. An alleged malicious prosecution is not a violation of a federal civil right unless it results in an arrest (Nesmith v. Alford, 318 F. 2d 110 [5th Cir., 1963]; Anthony v. White, 376 F. Supp. 567 [D.C. Del., 1974]).

In the instant case, the filing of the informations against the plaintiff, Clifford Arnold, occurred after his arrest, and did not result in any subsequent detention. In each instance he was arraigned and released on his own recognizance until charges were ultimately dismissed. His subsequent court appearances for which he claims lost wages and attorney's fees do not constitute a violation of a federal² civil right and therefore, those alleged damages are not cognizable in this section 1983 action.

There is, furthermore, no cause of action under section 1983 for an alleged malicious prosecution (cf. Anthony v. White, 376 F. Supp. 567 [D.C. Del., 1974]). Plaintiff's alleged expenses for additional lost wages and attorney's fees therefore are not cognizable in this action, and the award of compensatory damages for such additional lost wages and attorney's fees were improperly awarded herein.

B.

Insofar as the judgment apparently includes damages for assault or the use of excessive force in effecting the arrest, it is unsupported by the Record.

The jury verdict contains no finding of malice, assault or use of excessive force in effecting an arrest. Officer Cerami, according to the testimony of plaintiff's witnesses, as well as defendants', struck the plaintiff once, after the plaintiff

^{2/} In an appropriate case these might be the subject of a State action for malicious prosecution. Here, of course, there is no proof of malice. See extended discussion by the Trial Court on this point in trial transcript, pages 201-210.

began grappling with another police officer. Officer Cerami reacted in an emergency situation, and did quell the disturbance. He had little time to reflect and his conduct must be considered in that perspective (Huggins v. State, 46 A D 2d 924; Toomey v. N.Y. City Transit Authority, 6 A D 2d 906).

The record is absolutely barren of any showing of malicious intent or gross misconduct to support the award, particularly the extraordinary award of punitive damages in such an excessive amount.

It is apparent the award of punitive damages and the equally excessive amount of compensatory damages were a direct result of the Trial Court's erroneous instructions.

Punitive damages require a finding of malice, which is absent herein (Stringer v. Dilger, 313 F. 2d 536 [10th Cir., 1963]; Wilson v. Prasse, 325 F. Supp. 9, affd. 463 F. 2d 109; Caplin v. Oak, 356 F. Supp. 1250).

The award is excessive by any standard for the injuries sustained, and in view of the status of the defendants as peace officers and their reasonable belief that they were performing their duties in accordance with the law they were sworn to uphold, the award of punitive damages is not justified.

CONCLUSION

THE JUDGMENT IN ALL RESPECTS
SHOULD BE REVERSED.

Dated: Albany, New York
June 23, 1975

Respectfully submitted,

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Clifford J. Arnold,
Plaintiff-Appellee,

-against-

Donald M. Agen & Victor Cerami,
Defendants-Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellants herein.

On the 26th day of June 1975 I served
the annexed appellants' brief upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorneys at the
address es within the State respectively theretofore designated by
them for that purpose as follows:

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Sworn to before me this

26th day of June 1975

Beverly J. Smith

John E. Shea
JOHN E. SHEA
Notary Public, State of New York
No. 4609228
Qualified in Albany County
Commission Expires March 30, 1977